MOHD ABBAS DANUS BAKSAN

v.

PP

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
MOHD GHAZALI YUSOFF JCA
JAMES FOONG JCA
[CRIMINAL APPEAL NO: J-05-71-2004]
10 JULY 2006

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Murder and rape of 10-year old child - Evidence of prosecution - Unsworn statement - Plea of guilt to rape charge - Circumstantial evidence - Whether judicial commissioner had erred in appreciation of case for defence - Whether case against appellant proved beyond reasonable doubt*

This was an appeal by the appellant against his conviction by the High Court of the murder of one Nurul Huda Gani ('Nurul'), a 10-year old girl who had been raped and strangled, and the mandatory death sentence that he received thereof. The appellant had initially pleaded guilty to the charge of ravishing her and had been sentenced by the Sessions Court. The appellant's main ground of complaint was that the learned judicial commissioner ('JC') had failed to sufficiently appreciate the prosecution's evidence and the appellant's unsworn statement denying that he had killed Nurul, when arriving at his findings. In particular, there was insufficient appreciation by the trial court of the circumstantial evidence relied upon by the prosecution. The appellant also contended that his plea of guilt to the charge of rape lent credence to his denial of the killing of Nurul.

Held (dismissing the appeal)
Per Gopal Sri Ram JCA:

(1) The learned JC was very much alive to the fact that the case against the appellant rested on circumstantial evidence and he used the time-honoured formula, the "irresistible conclusion", when discussing the legal test to be applied to such evidence. Considering the circumstances and especially the appellant's conduct, so far as the appreciation of the prosecution's evidence was concerned, there was no merit in the appellant's argument that inferences favourable to the appellant were not

drawn from evidence that admitted of such inferences. Against the cold facts of this case, the appellant's plea of guilt to the charge of rape did nothing to weaken the prosecution's case. Accordingly, there was no merit in the submission that the appellant's plea of guilt to the charge of rape lent credence to his denial of Nurul's killing. It was clear from the judgment under appeal that the learned JC went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the unsworn statement were never put to the prosecution's witnesses and that, of course, would have the effect of diminishing the probative value that was to be attached to the unsworn statement. Taking into account all the relevant facts and circumstances of this case, there was no error in the way in which the learned JC appreciated the case for the defence. The evidence pointed to the appellant having committed this heinous crime; the case against the appellant had been proved beyond a reasonable doubt. (paras 10, 11, 12, 13 & 14)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan perayu terhadap sabitan dan hukuman mati yang dijatuhkan oleh Mahkamah Tinggi terhadapnya atas kesalahan membunuh seorang Nurul Huda Gani ('Nurul'), kanak-kanak berumur 10 tahun yang telah dirogol dan dicekik sehingga mati. Perayu pada mulanya mengaku salah terhadap pertuduhan memperkosa Nurul, dan telah dihukum oleh Mahkamah Sesyen. Bantahan utama perayu adalah bahawa yang arif pesuruhjaya kehakiman ('JC'), dalam mencapai rumusannya, telah gagal menilai dengan secukupnya keterangan pendakwaan serta keterangan tanpa sumpah beliau bahawa beliau tidak membunuh Nurul. Secara lebih khusus, mahkamah bicara telah gagal menilai secukupnya keterangan ikut keadaan yang menjadi sandaran pendakwaan. Perayu juga berkata bahawa pengakuan salahnya atas pertuduhan rogol telah memperkukuhkan lagi penyangkalannya terhadap pertuduhan membunuh Nurul.

Diputuskan (menolak rayuan)
Oleh Gopal Sri Ram HMR:

(1) Yang arif JC masih perihatin terhadap fakta bahawa kes terhadap perayu adalah bergantung kepada keterangan ikut keadaan dan beliau telah menggunakan formula teruji "irresistible conclusion" apabila berbicara tentang ujian undang-

undang yang hendak dipakai terhadap keterangan. Setakat yang berkaitan dengan penilaian keterangan pendakwaan, mengambilkira halkeadaan dan tingkah laku perayu, tidak terdapat merit pada hujah perayu bahawa andaian yang berpihak kepadanya telah tidak dibuat dari keterangan yang mewajarkan andaian sedemikian. Berdasarkan fakta dingin kes ini, pengakuan salah perayu atas pertuduhan rogol tidak sedikitpun melemahkan kes pendakwaan. Oleh itu, tiada merit pada hujah perayu bahawa pengakuan salahnya terhadap pertuduhan rogol telah memperkukuh penyangkalannya terhadap pertuduhan membunuh Nurul. Dari penghakiman yang dirayui, jelas bahawa yang arif JC telah meneliti semua hujah yang dibuat melalui kenyataan tanpa sumpah sebelum mendapatinya sebagai serba kekurangan dan tak berkesan. Beberapa perkara yang dibangkitkan dalam kenyataan tanpa sumpah tersebut tidak diajukan kepada saksi-saksi pendakwaan, dan ini menjejaskan nilai probatif yang boleh diberi kepada kenyataan tersebut. Mempertimbang keseluruhan fakta dan keadaan kes, tiada kesilapan pada cara yang arif JC menilai kes pembelaan. Keterangan menunjukkan bahawa jenayah keji ini memang dilakukan oleh perayu; kes terhadap perayu telah dibuktikan di luar keraguan munasabah.

Case(s) referred to:
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Director of Public Prosecutions v. Walker [1974] 1 WLR 1090 ***(foll)***
Mohamed Salleh v. PP [1969] 1 MLJ 104 ***(refd)***
Mohd Affandi Abdul Rahman & Anor v. PP [1998] 2 CLJ 383 CA ***(foll)***
Ng Hoi Cheu v. PP [1968] 1 MLJ 53 ***(refd)***
Syed Ali Syed Abdul Hamid v. PP [1982] 1 MLJ 132 ***(foll)***

Legislation referred to:
Evidence Act 1950, s. 8

For the appellant - Pritam Singh Brrard; M/s Pritam Singh Brrard
For the respondent - Abdul Rasid Sudin (Mohd Nordin Ismail with him)

[Appeal from High Court, Pulau Pinang; Criminal Trial No: MT(3)45-13-2004]

Reported by Suresh Nathan

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JUDGMENT

Gopal Sri Ram JCA:

[1] Nurul Huda Gani (Nurul) was 10 years old when she died. She was raped and strangled. Initially, the appellant was charged for ravishing her. He pleaded guilty to that charge and was sentenced by the sessions court. Later, he was charged, tried and convicted of her murder. He received the mandatory death penalty prescribed by law. He appealed against his conviction for murder. We heard his appeal on 3 July 2006. At the conclusion of arguments we dismissed his appeal and confirmed both his conviction and sentence. The reasons for our decision are now produced.

[2] The circumstances in which young Nurul met her end have been admirably set out in the judgment of Judicial Commissioner KP Gengadharan Nair (now KP Gengadharan Nair, J). All we need do is to summarise them.

[3] On the morning of 17 January 2004 at about 8.50am Nurul was sent on an errand by her elder sister, Aien (PW10). She was to go the nearby provision shop to purchase some food items. Nurul went off on her bicycle. But she never returned home. Her journey to and from the shop took her past the Tenaga Nasional Berhad substation where the appellant worked as a security guard. She arrived at the shop. Her errand took no more than a few minutes. But she never returned home. After waiting for a short while, Aien became anxious. She asked a boy to go to the shop to see if Nurul was alright. The boy returned with news that Nurul had come to the shop and then left. A search was organised. As the search party was passing the substation they noticed the appellant. They stopped and asked him if he had seen Nurul. He replied that he had not. A member of the search party wanted to enter the compound of the substation but the appellant refused him permission. Later, a second request was also refused. The appellant said that only the employer or policemen could enter the compound. Later still, the assistance of two policemen, Peter Andrew Fletcher (PW9) and Lance Corporal Rusli bin Alias (PW17) was secured. The appellant then denied the police officers entry unless they obtained permission from the appellant's superior. That permission was obtained. In fact the superior instructed the appellant to permit entry to the police officers. He nevertheless denied the police and the accompanying search party

entry into the compound. PW9, PW17 and two others climbed over the 11 foot gate and gained entry. PW9 after disarming the appellant who was brandishing a parang discovered Nurul's body in the toilet of the guard house occupied by the appellant. She was naked. There was a towel jammed in her mouth. A subsequent post mortem revealed that she had died of manual strangulation.

[4] At the close of the case for the prosecution, the learned commissioner found a case to answer and called upon the appellant to enter upon his defence. The appellant elected to make an unsworn statement. In it he denied that he had killed her. He placed the blame for the killing on PW23 (a self confessed drug addict) and one "Jojo" whom he said had accompanied the former. The learned judge very properly directed himself on the probative value of an unsworn statement by referring to the cases of *Mohamed Salleh v. Public Prosecutor* [1969] 1 MLJ 104 and *Ng Hoi Cheu v. Public Prosecutor* [1968] 1 MLJ 53. We would, in this context also refer to Director of *Public Prosecutions v. Walker* [1974] 1 WLR 1090, where Lord Salmon, when delivering the advice of the Judicial Committee said this:

> Much depends on the particular circumstances of each case. In the present case, for example, even on the approach that everything the respondent said in his unsworn statement was true, no jury (unless perverse) could have acquitted him on the ground of self-defence. There are however cases in which the accused makes an unsworn statement in which he seeks to contradict or explain away evidence which has been given against him or inferences as to his intent or state of mind which would be justified by that evidence. In such cases (and their Lordships stress that they are speaking only of such cases) the judge should in plain and simple language make it clear to the jury that the accused was not obliged to go into the witness box but that he had a completely free choice either to do so or to make an unsworn statement or to say nothing. The judge could quite properly go on to say to the jury that they may perhaps be wondering why the accused had elected to make an unsworn statement; that it could not be because he had any conscientious objection to taking the oath since, if he had, he could affirm. Could it be that the accused was reluctant to put his evidence to the test of cross-examination? If so, why? He had nothing to fear from unfair questions because he would be fully protected from these by his own counsel and by the court. The jury should always be told that it is exclusively for them to make up their minds whether the unsworn statement has any value, and, if so,

A what weight should be attached to it, that is for them to decide whether the evidence for the prosecution has satisfied them of the accused's guilt beyond reasonable doubt, and that in considering their verdict they should give the accused's unsworn statement only such weight as they may think it deserves.

B **[5]** Lord Salmon was, of course, dealing with a charge by a judge to a jury. Here the trial was by the learned judicial commissioner sitting alone. That is of no consequence. Because we must treat a direction by a judge of himself in the same way as a direction to a jury. See, *Alcontara a/l Ambross Anthony v. Public* C *Prosecutor* [1996] 1 CLJ 705. In the present instance, the learned judicial commissioner, after a careful analysis of the unsworn statement, concluded that it did not raise a reasonable doubt in his mind. He accordingly convicted the appellant.

D **[6]** At the outset of the hearing before us we admitted the record of the proceedings in the sessions court where the appellant had pleaded guilty to the charge of rape. This was at the instance of learned counsel for the appellant (who did not appear at the trial) whose application was not opposed by the E learned deputy who responded to the appeal. Learned counsel for the appellant submitted that the appellant's plea of guilt to the charge of rape lent credence to his denial of the killing of Nurul. We will deal with this argument at the appropriate place in this judgment.

F **[7]** Before us the appellant's main ground of complaint was that the learned judicial commissioner failed to sufficiently appreciate the prosecution's evidence and the appellant's unsworn statement when arriving at his findings. In particular, there was insufficient G appreciation by the trial court of the circumstantial evidence relied upon by the prosecution.

[8] Now, it is true that the evidence for the prosecution was largely, if not wholly, circumstantial. And it is learned counsel's complaint that the learned judicial commissioner failed to direct H himself that for an accused to be convicted on the basis of circumstantial evidence. With respect, we find no merit in this criticism. In *Mohd Affandi bin Abdul Rahman & Anor v. Public Prosecutor* [1998] 2 CLJ 383 this court said:

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> We do not consider that any particular form of words is necessary to convey to the minds of the jury the burden that lies upon the prosecution when it relies on circumstantial evidence to establish its case. The proposition that circumstantial evidence must, when taken together, irresistibly lead to the conclusion that the accused committed the offence is merely another way of saying that the prosecution must prove its case beyond a reasonable doubt. This is because any gap in the circumstances relied upon or an interpretation of them that reasonably leads to an alternative conclusion inconsistent with guilt would result in the prosecution not having proved its case beyond a reasonable doubt. See, *Jayaraman & Ors v. PP* [1982] 2 MLJ 306.

[9] In his judgment the learned judicial commissioner said this:

> I was of the considered view that the matters that I have referred to earlier, taken collectively, in the circumstances constituted a *prima facie* case against the accused that warranted the calling of the accused's defence to answer the charge against him. The behaviour and conduct of the accused was not, to my mind, consistent with that of a person who had had nothing to hide. Thus, I called for the accused's defence after I had reminded myself, and was mindful that there are no eye witnesses and in that sense the evidence against the accused is circumstantial evidence. In my view the cumulative effect of all the evidence led to the irresistible conclusion that it was the accused who committed the crime. (See *Sunny Ang v. Public Prosecutor* [1966] 2 MLJ 195).

[10] There you have it. The learned judicial commissioner was very much alive to the fact that the case against the appellant rested on circumstantial evidence. And he used the time honoured formula "irresistible conclusion" when discussing the legal test to be applied to such evidence.

[11] So far as the appreciation of the prosecution's evidence is concerned, we find no merit in the appellant's argument that inferences favourable to the appellant were not drawn from evidence that admitted of such inferences. Look at the circumstances again. First, there is the fact that the appellant was alone in the guardhouse when Nurul's body was found. Second, is the fact that Nurul's path to and from the provision store would have led her past the substation at which the appellant was a guard. Third, there is the appellant's conduct which is relevant and admissible by virtue of s. 8 of the Evidence Act 1950. That conduct is a matter discussed with care by the learned judicial commissioner. We find two instances of the appellant's conduct to

A be telling. In the first place, when asked by Aien whether he had seen a little girl (the reference here was clearly to Nurul) pass by he replied that he had not. This was a lie. Not only had he seen her, but, as circumstances unveiled themselves, her dead body was lying in the guardhouse toilet even as the question was asked and
B answered. We would in relation to this point refer to *Syed Ali bin Syed Abdul Hamid v. Public Prosecutor* [1982] 1 MLJ 132 where it was held that a deliberate lie told by an accused may amount to corroborative evidence against him. In that case Salleh Abas LP said:

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> In other jurisdictions a false statement made by an accused person concerning the surrounding circumstances in which an offence was committed whilst he had an opportunity to commit the offence can be regarded as a corroboration of the evidence against him. *Eade v. The King* [1924] 34 CLR 154 and also *Regina v. Lucas (Ruth)*
> D [1981] 3 WLR 120. We accept the decisions in these cases to be good law. In this case we hold that the representation he made to PW4 regarding the purpose of borrowing the car was a deliberate lie and is therefore a corroborative evidence against him for which he must explain. Such lie is a reflection of his
> E consciousness of guilt as regards the use he intended to make of the car in question.

[12] Next there is evidence that the appellant was most reluctant to let even the police have access into the guardhouse. He repeatedly denied the police and members of the search party
F access to the guardhouse. Why? The answer is obvious. It must have been to prevent or at least delay the discovery of Nurul's body. That is the irresistible inference to be drawn from his conduct. Then take the appellant's own story. That it was PW23 who committed the murder and the rape. If he knew that Nurul
G had been harmed by PW23, the most natural thing for the appellant to have done is to either help the girl or to call for the police to have PW23 apprehended. But he did neither of these things. So, the only fair inference from his conduct is that he wanted to conceal his own crime and not a crime committed by
H some other person. Against these cold facts, the appellant's plea of guilt to the charge of rape does nothing to weaken the prosecution's case. We accordingly find no merit in the submission that the appellant's plea of guilt to the charge of rape lends credence to his denial of Nurul's killing.

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[13] In so far as the appreciation of the appellant's unsworn statement is concerned, we have already discussed earlier the way in which such statements are to be treated as a matter of law. So far as factual treatment is concerned, it is clear from the judgment under appeal that the learned commissioner went through all the points made in the unsworn statement and found them to be wanting. Some of the matters raised in the unsworn statement were never put to prosecution witnesses. That, of course, will have the effect of diminishing the probative value that is to be attached to the unsworn statement. There is also nothing in the unsworn statement to explain the appellant's conduct in seeking to prevent the police from gaining access to the guardhouse. Further, there is no explanation as to why he told a deliberate lie to Nurul's sister Aien. Taking into account all the relevant facts and circumstances of this case, we find no error in the way in which the learned judicial commissioner appreciated the case for the defence that was placed before him.

[14] Having read and re-read the record we are satisfied that the evidence fairly points to the appellant having committed this heinous crime. In our judgment, the case against the appellant had been proved beyond a reasonable doubt. The appeal was accordingly dismissed.